INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1223

DANIEL J. HOULIHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 460–465) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 9, 1942 (R. 465–466). The petition for a writ of certiorari was filed May 7, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a conspiracy to evade military service is a violation of Section 11 of the Selective Training and Service Act of 1940.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894 (50 U. S. C. 311), provides:

> Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or

abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

Petitioner and two others were indicted in one count for violation of Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885, 894 (50 U. S. C. 311). The indictment alleged that the defendants unlawfully, wilfully, and knowingly conspired and agreed to evade the requirements of the Act and the rules and regulations made pursuant thereto in counseling, aiding, and abetting Francis M. O'Connell, a person required to register thereunder, to evade service in the land and naval forces of the United States (R. 6–8). At the trial the Government introduced evidence

showing that the defendants had conspired to bribe a Selective Service investigator in order to procure a deferment for the defendant Francis M. O'Connell, but there was no evidence that the defendants had conspired to interfere with the administration of the Act by force or violence. The defendants were found guilty (R. 426) and petitioner was sentenced to two years' imprisonment (R. 431). On appeal to the Circuit Court of Appeals for the Second Circuit the convictions were affirmed (R. 460–465). Only the petitioner has applied for a writ of certiorari.

ARGUMENT

Petitioner does not challenge the sufficiency of the evidence or otherwise dispute the fact that he is guilty of participation in a conspiracy to violate the provisions of the Selective Training and Service Act of 1940 (see R. 464). His sole contention is that Section 11 of the Act prohibits only conspiracies to hinder the administration of the Act by force and violence and does not punish conspiracies to commit other substantive offenses (Pet. 10–16). We submit that both the substantial purpose and the words of the statute show that the court below correctly rejected this interpretation.

Section 11 shows on its face that its purpose is to punish, and thereby prevent, all interferences with the operation of the selective service system. The natural first step to take in accomplishing that object was to define the substantive offenses

which would interfere with the operation of the selective service system. Congress took that step; it listed the offenses and placed all of them on an equal footing, thus showing that, contrary to the petitioner's contention (Pet. 15–16), it did not view the offense of obstructing the administration of the Act by force and violence as more serious than the others. The natural second step for Congress to take to carry out the broad purpose was to outlaw all conspiracies to commit any of the substantive offenses prohibited by the Act. To do this a new and express provision was necessary for several reasons. Experience in 1917 and 1918 had shown that although Section 37 of the Criminal Code (18 U. S. C. 88) punished conspiracies to violate the draft laws when there was an overt act, nevertheless it was not always desirable to bring such prosecutions under the general conspiracy statute, probably because the penalty was not sufficiently severe.[1] Section 4 of the Espionage Act (50 U. S. C. 34) was not applicable when the Selective Service Act of 1940 was drafted, because the country was not at war.[2] And Section 6 of the Criminal Code (18 U. S. C. 6) proscribes conspiracies to obstruct the operation of the Selec-

[1] This conviction cannot be sustained under that section because no overt act was alleged in the indictment (see R. 465).

[2] As to the applicability of this section in wartime, see *Haywood* v. *United States*, 268 Fed. 795 (C. C. A. 7), certiorari denied, 256 U. S. 689.

tive Service Act only where the use of force is contemplated. In view of these statutory provisions there was little or no reason for Congress to deal specifically, as petitioner contends it has done (Pet. 15), with conspiracies to obstruct the operation of the Act by force and violence; to do so would have been to duplicate Criminal Code, Section 6,[3] and such conspiracies would, in any event, be rare. On the other hand, the necessary and natural step for Congress to take in carrying out the general purpose of Section 11, was to punish any conspiracy to commit a substantive offense defined by the Act, treating all such conspiracies equally just as it treated equally the substantive offenses.

We submit that Congress took this step when in Section 11 it added to the list of prohibited acts the disjunctive phrase "or conspire to do so." The comma, which separates that phrase from the clause "or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto," would not have been deliberately inserted[4] to separate the two, had it not been intended that

---

[3] For an example of the use of Section 6, see *Reeder* v. *United States*, 262 Fed. 36 (C. C. A. 8), certiorari denied, 252 U. S. 581.

[4] The conjunction "or" is employed 47 times in Section 11 and in only 20 instances is it preceded by a comma. It is evident, therefore, that the punctuation employed was used advisedly and intended to have significance.

the phrase "or conspire to do so" should condemn a conspiracy to commit any of the offenses denounced in the preceding portions of the section. Furthermore, apart from the punctuation of the statute, it is the settled rule that "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Porto Rico Ry. Co.* v. *Mor,* 253 U. S. 345, 348. See also, Lord Bramwell in *Great Western Ry. Co.* v. *Swindon &c. Ry. Co.,* L. R. 9 App. Cas. 787, 808; *United States* v. *Standard Brewery,* 251 U. S. 210, 218; *Chicago and N. W. Ry. Co.* v. *Booten,* 57 F. (2d) 786, 799 (C. C. A. 8); *In re Graves' Estate,* 27 F. Supp. 717, 719 (W. D. Ky.). Petitioner asserts (Pet. 13–14) that the use of the plural verb "conspire" forbids this interpretation but, as the court below pointed out (R. 464), although Section 11 begins with the singular noun "any person," the plural form "any person or persons" appears later in the section so that the verb "conspire" has various subjects, some singular and some plural, making use of the plural form natural and not incorrect.

Petitioner asserts that the decision below conflicts with the line of decisions holding that a criminal statute, to be valid, must define with certainty what it forbids. E. g. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81. Obviously, those

cases have no application here. Nor does the contention that he is entitled to be warned of whether his act is a crime come well from a defendant who deliberately embarked on a course of conduct which would lead to violations of other well known criminal statutes.

CONCLUSION

The case was correctly decided below and there is neither a conflict of decisions nor any question of general importance. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
KEITH BROWN,
Attorneys.

MAY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942